IN THE

SUPREME COURT OF THE STATE OF FLORIDA

66191

STATE OF FLORIDA,	)
Petitioner,	)
vs.	)
KAREN MISCHLER,	)
Respondent.	)

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CASE NO. 66,191

BRIEF ON THE MERITS OF AMICUS CURIAE

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PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida and the Appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and Appellee in the lower courts. In this brief, the parties will be referred to as they appear before this court.

The symbol "AR" will be used in this brief to denote additional record consisting of transcript of hearings on motion for new trial and sentencing.

SUMMARY OF THE ARGUMENT

POINT I

The district courts of appeal have the obligation to review a trial court's reasons for departure to ascertain whether they are clear and convincing, as required under Fla. R. Crim. P. 3.710. "Clear and convincing" means reasons which are based on credible and concrete evidence, and which produce in the observer an unhesitating conviction that departure is warranted, so that no reasonable person could differ.

POINT II

Reasons for departure cannot be based on factors which are already scored in determining the guidelines sentence. Allowing such "double dipping" would result in the total nulllification of the guidelines, in addition to violating fundamental concepts of fairness.

POINT III

Where the trial judge considers, in departing from the guidelines sentence, reasons which are not clear and convincing as well as reasons which are, the appellate court should reverse the sentence, since it can have no way of knowing whether, absent consideration of the improper reasons, the trial judge would have departed from the guidelines sentence, and, if so, to what extent.

POINT IV

A new trial was required where one of the jurors who tried Mrs. Mischler lied about the existence of charges pending against him by the state, for which he had not yet been sentenced. This false statement related directly to the juror's ability to be fair and impartial, especially where immediately after the jury returned its guilty verdict, the juror approached the prosecutor and informed her of his pending sentencing.

STATEMENT OF CASE

Mrs. Mischler accepts the State's Statement of the Case, but adds:

Immediately prior to the sentencing proceeding, Mrs. Mischler announced her decision, through counsel, to be sentenced under the sentencing guidelines. Under the guideline score sheet, Mrs. Mischler scored a thirteen, which results in a recommended sentence of any non-state prison sanction [AR 38]. However, the Trial Court departed from the sentencing guidelines, and sentenced her to three years in the state prison system [AR 38].

STATEMENT OF FACTS

Mrs. Mischler accepts the State's Statement of the Facts, except for the only complete paragraph on page 8 and the last sentence beginning on that page, which are unduly argumentative. Mrs. Mischler observes that she testified extensively at trial, and maintained that her transactions at the construction company were undertaken on the orders of her boss, Mr. Lowe (R384-389, 393-401). Both Mr. and Mrs. Mischler performed many errands and small tasks for the Lowes outside the business environment (R 357-358, 405). Mrs. Lowe and another company employee testified that Mrs. Mischler was a good employee (R 317, 342). There were indications that Mrs. Lowe was curious about the financial status of the business after she left the company's employment (R 383-384) and that Mr. Lowe sought to hide it from her (R 398-399).

After the trial, one of the jurors approached the prosecutor and told her that he had charges pending against him for which he was awaiting sentence (AR 37, R 543). The juror, Hugh Warman, had never disclosed this fact to the parties before trial, despite the trial judge's voir dire regarding any contact of the prospective jurors with the criminal justice system "other than traffic violations" (R 544). Mrs. Mischler's motion for new trial made on these grounds (R 543-546) was denied (R 547) after hearing (AR 2-14).

ARGUMENT

POINT I

DISTRICT COURTS OF APPEAL HAVE THE OBLIGATION TO REVIEW DEPARTURES FROM THE SENTENCING GUIDELINES TO INSURE THEY ARE MADE FOR CLEAR AND CONVINCING REASONS.

The recently adopted sentencing guidelines, set forth in Fla. R. Crim. P. 3.701, are based on designated sentence ranges to be imposed for various offense catagories. In Re Rules of Criminal Procedure, 439 So.2d 848 (Fla. 1983); Section 921.001, Fla. Stat. (1983). The specific intent of the guidelines is to ensure uniformity and to alleviate disparity in the sentencing process, and to prevent overcrowding in our prison system. Section 921.001. In its adoption of the guidelines, this court reiterated the same general concerns, expressed by the legislature when it formed legislation establishing the Sentencing Commission:

> "Sentencing guidelines are intended to eliminate unwarranted variation in the sentencing process by reducing the subjectivity in interpreting specific offense -- and offender -- related criteria and in defining their relative importance in the sentencing decision."

The elimination of subjective variations in the sentencing process which had heretofore existed geographically -- and indeed from judge-to-judge -- throughout the state, is its goal.

The history of the guidelines clearly reflects their remedial intent. Consequently, they should be accorded a liberal construction so as to advance the remedy provided. Cf. Gaskins v. Mack, 91 Fla. 284, 107 So. 918 (1926); Amos v. Conklin, 99

Fla. 206, 126 So. 283 (1930). Conversely, exceptions to the guidelines should be narrowly construed. Cf. Farrey v. Bettendorf, 96 So.2d 889 (Fla. 1957).

The sentencing guidelines embody the following principles under Fla.R.Crim.P. 3.701 (b) (6):

> 6. While the sentencing guidelines are designed to aid the judge in the sentencing decision and are not intended to usurp judicial discretion, departures from the presumptive sentences established in the guidelines shall be articulated in writing and made only for clear and convincing reasons. (Emphasis added.)

Any departure from the guideline sentence must be in accordance with Fla.R.Crim.P. 3.701 (d) (11):

> 11. Departures from the guideline sentence: Departures from the presumptive sentence should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating the sentence. Any sentence outside of the guidelines must be accompanied by a written statement delineating the reasons for the departure. Reasons for deviating from the guidelines shall not include factors relating to either instant offense or prior arrests for which convictions have not been obtained.

As observed by Judge Letts in his opinion in the instant case, "The definition of 'clear and convincing reasons' is not given to us in the guidelines and no Florida court has yet attempted to define them." Mischler v. State, 458 So.2d 37, 39 (Fla. 4th DCA 1984). However, he found guidance in Slomowitz v. Walker, 419 So.2d 797 (Fla. 4th DCA 1983), where "clear and convincing" evidence was discussed:

> "Our review of the foregoing cases convinces us that a workable definition of clear and convincing evidence must contain both qualitative and quantitative standards. We therefore hold that clear and convincing requires that the evidence must be found to be credible; the facts to which the witnesses

> testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegation sought to be established."

This definition, in fact, was used as a predicate for the sentencing guidelines "clear and convincing reasons for departure." See, Mischler v. State, supra note 6 at 40 (although the Mischler Court nevertheless purported to find it not "readily adaptable" to the guidelines). Under the Slomowitz framework, then, reasons given by the trial judge for departing from the sentencing guidelines must be credible and concrete, and must produce in the neutral observer "a firm belief or conviction, without hesitancy," that departure is appropriate.

This Court has itself formulated an even more readily comprehensible "clear and convincing" test in a similar sentencing review situation. Where a jury recommends a life sentence and the trial judge imposes the death penalty, this Court has held:

> "A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting the death sentence should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State 322 So.2d 908, 910 (Fla. 1975) (Emphasis added).

Thus, a trial judge's departure from the presumptively correct, jury-recommended life sentence will be upheld only if his reasons for doing so are so "clear and convincing" that no reasonable person could differ. The same standard must apply where a trial

judge departs from the presumptively correct, guidelines-recommended sentence. It is by this standard that the various reasons for departure given by trial judges around the state must be measured, and the district courts of appeal abdicate their responsibility if they do not hold the trial courts to this standard.

The State appears to agree that the "clear and convincing" test is the applicable one, Petitioner's Brief at pages 17-18. Having accepted, as it must, the necessity of the trial court to state clear and convincing reasons for its sentencing departure, however, the State proceeds in its analysis as though the trial judge's sentencing discretion is as untrammelled and unguided as before the guidelines were in effect. Thus, the State's view of guidelines review by the appellate court seems to be that, so long as some reason is stated by the trial judge for his departure, no further review of the discretionary sentencing function is permissible. See, Petitioner's Brief at page 16. That this cannot be a correct view of an appellate court's function where the guidelines have been departed from is patent from the express provision made for appellate review in Sections 924.06 (1) (e) and 924.07 (9), Florida Statutes and R.App.P. 9.140, in addition to the general (and traditional) authorization for appeal from an "illegal" sentence. Sections 924.06 (1)(d) and 924.07 (5), Florida Statutes. In order to effect this right to appellate review, the trial judge is required to enter a written order delineating his reasons for departure from the guidelines. R.Cr.P. 3.710 (d)(11). Clearly, the guidelines contemplate that the decision to depart from the presumptively

proper sentence will be subjected to meaningful, objective review by an appellate court, not just the kind of rubber stamping of a sentence so long as it is within the statutory minimum which was the traditional "limit" upon a trial judge's sentencing discretion.

Certainly, the trial courts still have sentencing discretion. But that discretion has now been channeled and circumscribed. The sentencing process is no longer one where the the trial judge has absolute license to impose any term within the statutory minimum, for whatever reason he deems proper. Instead, he must be able to articulate "clear and convincing reasons" for his decision to depart from the guidelines sentence. And to be sure that sentencing determinations remains at least minimally consistent throughout the State, the espoused function of the guidelines,the district courts of appeal are charged with the responsibility of reviewing those reasons to assure that they are truly "clear and convincing": supported by credible evidence and producing an unhesitating conviction as to their validity, such that virtually no reasonable person could differ as to the need to depart.

In reviewing sentencing guidelines appeals, then, the appellate court's duty is to determine whether the reasons stated for departure are indeed clear and convincing. If so, the sentence departure will be upheld. If not, then it must be reversed. Only in this way will the sentence consistency which is the goal of the guidelines be achieved. Moreover, it is an "abuse of discretion" for the trial judge to depart from the guidelines sentence unless truly clear and convincing reasons are

stated therefor, since the trial judge has discretion to depart from the guidelines only where clear and convincing reasons exist for doing so.

In the present case, the District Court of Appeal has properly performed its review function by examining the trial judge's reasons for departure to determine whether they are clear and convincing . In this process, there is nothing inappropriate about comparing the kind of reasons given by the trial judge below with those deemed adequate or inadequate in other cases. The guidelines intentionally do not specify what may be used as reason for departure, in order to allow maximum flexibility to the sentencing judge, See, Higgs v. State, 455 So.2d 451 (Fla. 5th DCA 1984), so long as the factors employed are "consistent and not in conflict with the Statement of Purpose." Committee Note, Fla.R.Cr.P. 3.710 (d) (11). In order to allow this freedom without also authorizing the total circumvention of the guidelines, however, it is beneficial and appropriate that the appellate courts interpret and develop what is "consistent and not in conflict with" the purpose of the guidelines and what is not, as real cases in conflict are presented to them. Exactly the same kind of shaking out process was developed in this court's initial review of the scope of the aggravating and mitigating factors in death penalty cases, Dobbert v. State, 328 So.2d 433 (Fla. 1976), and, in an example even more on point, by the Minnesota courts in interpreting their own sentencing guidelines.[1] E.g. cases cited, infra, Point II, at page 16. See

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[1] Minnesota law is persuasive authority in this area, since Minnesota is one of only three states using these guidelines (Pennsylvania and Florida are the others), and employs a

also, Petitioner's brief, last sentence beginning at page 19. Thus, the appellate court below, exercised its proper duty in reviewing the trial court's reasons for departing from the sentencing guidelines to determine if they were clear and convincing.

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burden analogous to Florida's "clear and convincing reason" for departing from the recommended sentence.

POINT II

THE DISTRICT COURT OF APPEAL PROPERLY DETERMINED THAT THE TRIAL JUDGE'S REASONS FOR DEPARTING FROM THE SENTENCING GUIDELINES WERE NOT CLEAR AND CONVINCING. (Restated)

A. THE TRIAL COURT ERRONEOUSLY DEPARTED FROM THE GUIDELINES ON THE BASIS THAT MRS. MISCHLER COMMITTED A "WHITE COLLAR CRIME." (Petitioner's Points II & III.)

The first major theme of the trial court's reasoning for departing from the sentencing guidelines in the present case was that Mrs. Mischler was charged with and convicted of a "white collar" crime:

> "There was a flagrant and exceptional white collar crime which involved a secretary-bookkeeper in a shocking and brazen theft from her employer. The relationship of employer and employee involves special trust and confidence and is a situation which is differentiated from theft from a stranger or from an unoccupied building." (R 549)[2]

The District Court of Appeal below correctly observed, "White collar crime is a crime involving theft, fraud or violation of trust made possible because of the relationship inherent in the form of the employment." Mischler v. State, 458 So.2d 37 (Fla. 4th DCA, 1984). Thus, any theft by embezzlement must necessarily involve an employer-employee relationship. Since one's "social status" is defined by one's employment situation, "white collar crime and/or social status goes hand in hand so that the

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2 The trial court's sentencing order justifying its departure from the guidelines sentence in the present case is set out in toto in the Appendix to the brief.

two are virtually indistinguishable," Mischler v. State, supra at 38. The guidelines expressly forbid sentencing an accused on the basis of social or economic status. Fla.R.Crim.P. 3.701(b)(1).

The trial court also suggested that because Mrs. Mischler's employer "was a small contractor whose business was almost devastated and bankrupted by the actions of this defendant," Mrs. Mischler should be sentenced more harshly. This is merely the converse of saying that a defendant may be more harshly sentenced for stealing from a rich man, but less harshly for stealing from a poor man, which is obviously an untenable position.

Another aspect of this issue has more far-reaching implications and must be examined in greater depth. For, because every embezzlement of necessity involves an employer-employee relationship, that special relationship is an element of the crime for which the defendant has been convicted. It cannot, therefore, be considered as a reason to depart from the sentencing guidelines. See, State v. Hines, 343 N.W.2d 869 (Minn. App. 1984) [trial court cannot take element of offense and make it reason for departure]; State v. Young, 312 S.E.2d 665 (N.C. App. 1984) [judge's reason for departure, that advantage was taken of positions of trust and confidence which defendant had as parent of child, could not be considered since crime she was convicted of is based on relationship of parent and child, and that relationship cannot be used again to exceed presumptive sentence]. Such factors have already been included in the weighting of the scored factors under the guidelines:

> "Weighting the factors is designed to add a measure of uniformity to the sentencing process and thereby eliminate unwarranted sentences

> variation. The weights are unique to each offense category and relate only to those offenses contained within that category."

Fla. R. Crim. P. 3.710 (II: Guidelines Scoresheet, introduction) (emphasis added).

Patently, if the same factor is used to depart from a guideline sentence as was used to set the guideline sentence in the first place, the exercise of setting a guideline has been rendered nugatory: why bother to carefully calculate a sentencing range based on specific factors, when any trial judge can then recalculate the entire equation based on exactly the same input? The result of such a process will be to nullify the fundamental purpose of the guidelines, "to eliminate unwarranted variation in the sentencing process." As observed by Judge Sharp in her dissent in Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984):

> "It appears to me that the design of the guidelines implicitly prohibits the second use of a defendant's prior record to further enhance his punishment. If uniformity in sentencing is to be achieved through use of the guidelines, Fla.R.Crim.P. 3.701(b), its mandates and exclusions should control the whole sentencing process. See Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984)."

In State v. Hagen, 317 N.W.2d 701, 703 (Minn. 1982), the Minnesota High Court categorically rejected a trial judge's consideration of a defendant's likelihood of returning to criminal conduct as an aggravating factor. The Court reasoned:

> "Such a factor potentially could be subject to serious abuse and logically could be used to justify indefinite confinement, something which is not permitted by law for any offense other than first-degree murder."

The same reasoning led the Minnesota Court to reject utilization of a defendant's prior record as a reason to depart from a guidelines sentence:

> "Generally the sentencing court cannot rely on a defendant's criminal history as a ground for departure. The Sentencing Guidelines take one's history into account in determining whether or not one has a criminal history score and, if so, what the score should be. Here defendant's criminal history was already taken into account in determining his criminal history score and there is not justification for concluding that a quantitative analysis of the history justifies using it as a ground for departure." State v. Magnan, 328 N.W.2d 147, 149-150 (Minn. 1983).

See also, State v. Brusver, 327 N.W.2d 591 (Minn. 1982); State v. Barnes, 313 N. W.2d 1 (Minn. 1981).

The courts of this State have applied similar analysis in refusing to countenance, for example, the Parole Commission's utilization of an element included within the crime for which sentence was imposed, which consequently formed the basis for computing the offender's presumptive parole release date, as a reason for aggravating that date, Mattingly v. Florida Parole and Probation Commission, 417 So.2d 1163 (Fla. 1st DCA 1982); Jacobson v. Florida Parole and Probation Commission, 407 So. 2d 611 (Fla. 1st DCA 1981). See also, Provence v. State 337 So.2d 783, 786.(Fla. 1976), in which this Court held that it was improper to consider the same factor twice in aggravation of a defendant's death sentence. In the sentencing guidelines context, the First District Court of Appeal has recently reached the same conclusion:

> "We agree with appellant that the trial court adopted a number of reasons for departure from the guidelines that are inappropriate. For example, the factors that the 'robbery was

> premeditated and calculated and for pecuniary gain' and '[that] there was no provocation [for the robbery]' are, practically speaking, an inherent component of any robbery, and hence may properly be viewed as already embodied in the guidelines recommended sentencing range." Carney v. State 458 So.2d 13, 15 (Fla. 1st DCA 1984).

Consequently, the trial judge's stated justification in the instant case for its sentencing departure on grounds which were inherent in the nature of the crime for which Mrs. Mischler stood convicted was improper.

Similar reasoning must preclude upholding the trial judge's proffered justification that:

> "A persistent media and public perception that white collar criminals are somehow not punished. It is my belief that a white collar crime deserves a harsher sanction than other property crimes." (R 549).

Sentencing a defendant in excess of the guidelines to demonstrate how serious a crime, otherwise within the norm of its class, is to the sentencer is just as impermissible as considering a factor which has already been taken into account when scoring the offense. State v. Lattimore 311 S.E.2d 876 (N.C. 1984) [trial judge erred in finding additional aggravating factor that the presumptive sentence does not do substantial justice to the seriousness of the crime, which was fully considered by legislature in establishing presumptive sentence]. As cogently stated by Judge Sharp in Hendrix v. State, 455 So.2d 449, 451 (Fla. 5th DCA 1984)

> "The trial judge in this case thought the presumptive sentence was too light a punishment for this crime and this defendant with his prior record. I agree. However, the degree of punishment afforded by the guideline, or lack thereof, should not be grounds for enhancement.

> The basic problem is the generally light punishments programmed as presumptively correct in the guidelines.
>
> The legislature can remedy this problem. However, if in the meantime the courts render the guidelines meaningless by allowing departures in violation of the guidelines rules and mandates, there will be nothing left to remedy. Sentencing guidelines in Florida will become an interesting but failed social experiment."

It is important not to forget, after all, that:

> "The sentencing guidelines were not promulgated for the purpose of benefiting criminal defendants, but to promote uniformity in the punishment meted out to those convicted of the same offense, whose prior conviction records and other relevant factors are comparable. The point apparently disregarded by many is that those defendants choosing to be sentenced in accordance with the sentencing guidelines are required to serve the entire term of their sentences, reduced only by gain time, and are not eligible for parole. On the other hand, those who are not sentenced under the guidelines, although their sentences may initially be for a longer term, will be eligible for parole and may in fact receive an earlier release date than if sentenced under the guidelines." Knight v. State, 455 So.2d 457, 458 (Fla. 1st DCA 1984).

These considerations convinced the Fourth District Court of Appeal to hold in another case that a trial court may not depart from the guidelines because a harsher sentence will be a "deterrent" to others.

> "If that were so, all punishment would automatically be aggravated, the very antithesis of what the guidelines were designed to accomplish." Williams v. State So.2d (Fla. 4th DCA, opinion filed December 5, 1984) [9 FLW 2533] (review pending on other grounds, Supreme Court Case No. 66,288).

As a result, the trial judge erred in departing from the sentencing guidelines on these grounds, because the circumstances surrounding the white collar crime in the instant case,

taken as a whole and as analyzed in its constituent parts, supra, do not support departure from the sentencing guidelines. The District Court of Appeal's certified question must therefore be answered in the negative, thus:

> "The theft by a bookkeeper of a major portion of her employer's assets does not constitute a clear and convincing reason to depart from the guidelines and aggravate a sentence."

> B. THE TRIAL JUDGE ERRONEOUSLY CONSIDERED MRS. MISCHLER'S CONTINUED PROTESTATIONS OF INNOCENCE AS LACK OF REMORSE TO JUSTIFY DEPARTURE FROM THE SENTENCING GUIDELINES. (Petitioner's Point IV)

The trial court's finding that Mrs. Mischler was not remorseful (R 550)[3] was based entirely on her statement in the presentence investigation report that she did not commit the alleged theft, that her employer was the culpable party, and that she lost at trial because he had money and those with money "ruled the world." (R 549-550). This profession of innocence, however persuasive or unpersuasive it might be in light of the jury's verdict, cannot be considered as grounds to believe that Mrs. Mischler had "no remorse." In Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), this Court unequivocally held that a defendant's continuing assertion of innocence even after conviction cannot be used as an indication of lack of remorse to aggravate the sentence. As recognized by the Fourth District Court of Appeal in the present case, consideration of Mrs. Mischler's assertion of innocence at her sentencing as a basis

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3 See Appendix.

for departing from the sentencing guidelines was totally improper. Accord, Hubler v. State, 458 So.2d 350 (Fla. 1st DCA 1984).

The State's attempt to distinguish the instant case from Pope v. State, supra, are at best confusing and at worst misleading. Mrs. Mischler's statement[4] as set forth in the trial court's sentencing order reveals, in context, a denial of guilt and a reassertion of her defense at trial, that her employer, not she, was the "crook" who embezzled the firm's money. Immediately following this summary is the trial judge's remark that, "The evidence of her guilt is clear, convincing and overwhelming. Her lack of remorse is appalling." (R 550). Thus, the instant case falls directly within the proscription of Pope v. State, supra.

Finally, the State's suggestion that the trial judge found that Mrs. Mischler was not remorseful because she was unable or unwilling to make restitution is somewhat puzzling. Is the State urging that someone who continues to profess his innocence must nevertheless exhibit "remorse" by offering to pay the damages he denies he has inflicted, or otherwise face enhancement of his sentence? Is that different from the kind of coercion to plead guilty which Pope v. State, supra disapproves? Or is

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4 "The defendant stated that this has been going on for two years and she didn't do it. She stated that she keeps telling the truth and she doesn't know how they can get away with this. She further related that he (the victim) has the money and the people with money rule the world. She advised that people are following her and she is receiving obscene and hang-up calls. She further stated that she did things that the victim told her to do and that he is a crook who can go free on the street. She stated she doesn't understand." (R 549-550).

the State suggesting that those who cannot pay restitution may properly be imprisoned instead? Isn't there an equal protection problem with that? Not to mention Florida's prohibition against imprisonment for debt? Does the State really base its argument on this interpretation of the trial judge's reasons for departure? If so, Carney v. State, supra, at 15, correctly rejects this position. Thus, neither Mrs. Mischler's inability to make restitution nor her "lack of remorse" can be considered clear and convincing reasons to depart from the guidelines sentence in the present case.

POINT III

WHERE CERTAIN OF THE REASONS GIVEN BY THE TRIAL COURT FOR DEPARTURE FROM THE SENTENCING GUIDELINES ARE NOT "CLEAR AND CONVINCING", THE SENTENCE MUST BE REMANDED FOR REDETERMINATION WITHOUT CONSIDERATION OF THE IMPROPER REASONS. (Restated)

In death penalty cases, this Court has repeatedly remanded for reconsideration of the sentence where aggravating circumstances relied on by the trial judge for imposition of the death penalty have been reversed and a least one mitigating factor existed, even though other aggravating factors are left standing. Elledge v. State, 346 So.2d 998 (Fla. 1977). And on a less volatile level, a trial court's determination that a defendant has violated his probation will be reversed where a finding that he committed a substantive violation of probation has been vacated, even though technical violations in themselves sufficient to justify revocation remain unchallenged. E.g., Jess v. State, 384 So.2d 328 (Fla. 3rd DCA 1981).

The basis for these decisions is exactly the same. In Elledge, this Court queried:

> Would the result of the weighing process [leading to imposition of the death sentence] by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial ..." 346 So.2d at 1003.

In Jess v. State, the appellate court likewise confessed itself in a quandary as to the trial judge's response had he considered only the legally established violations of probation:

> "We do not know, however, whether the trial judge would have revoked the probation or imposed the same sentence on just that [tech-

> nical] ground, without consideration of the [unproven] burglary. We therefore think it appropriate to remand the cause so that the lower court may now make those determinations." 384 So.2d at 329.

The decision as to what sentence to impose is one with crucial impact on a defendant. Because the trial judge has enormous discretion as to the amount of time to impose, within legal limits, and some discretion as to whether to depart from the sentencing guidelines, it is essential that this discretion be exercised in an informed and proper manner, with consideration only of those factors which are proper. Since it is almost always difficult if not impossible to determine what weight has been given by the trial judge in his sentencing decision to any particular factor, it is imperative that a finding that certain factors considered were improper result in remand for consideration of the sentence in light of the correct facts. This remedy has uniformly been allowed in sentencing situations. See, e.g., McEachern v. State, 388 So.2d 244 (Fla. 5th DCA 1980) [defendant penalized for going to trial, case remanded for reconsideration of sentence]; Southall v. State, 353 So.2d 660 (Fla. 2nd DCA 1977) [defendant's previous conviction set aside, case remanded for reconsideration of sentence]; Hicks, v. State, 336 So.2d 1244 (Fla. 4th DCA 1976) [mistake as to extent of prior record, case remanded for reconsideration of sentence].

In the instant cases, the Fourth District Court of Appeal remanded an order for the trial court to reconsider its sentence in light of the incorrectness of certain of its reasons for departing from the guidelines sentence. See also, Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984). The appellate court

below recognized that many factors go into the sentencing decision to affect both whether a departure is made and, crucially, the extent of that departure. Assuming that the trial judge will impose exactly the same sentence even after being advised that his reasons for setting the original term were improper assumes a cynicism on the part of the trial bench which is surely unwarranted. This is particularly true since, unlike in a death penalty case where no mitigating circumstances exist , or a probation revocation where a finding of one technical violation is reversed but several other technical violations remain validly proven, there is in a sentencing guideline case no presumption in favor of departure from the guidelines to a specified degree. Rather, it is the propriety of the guideline sentence which is presumed, Fla.R.Crim.P. 3.710(d)(11). Consequently, it is appropriate that the instant cause be remanded for resentencing, even should some of the reasons for departure from the guidelines be held proper by this Court.

POINT IV

THE TRIAL COURT ERRED IN DENYING MRS. MISCHLER'S MOTION FOR HER TRIAL WHERE A JUROR LIED ABOUT HIS PRIOR CONTACTS WITH THE CRIMINAL JUSTICE SYSTEM.[5]

After the trial, a juror approached the prosecutor and engaged her in conversation [AR 37]. As a result of that discussion, the prosecutor learned for the first time that the juror was currently awaiting sentencing in a pending criminal prosecution. (AR 7). Neither that circumstance nor the juror's prior arrest record had been disclosed during the course of voir dire. Although the voir dire was not reported or transcribed, Mrs. Mischler's trial counsel, as an officer of the Court, represented in both her Motion for New Trial (R 544), and at the time of the argument on the Motion for New Trial , that the juror had not responded accurately when the trial judge asked whether any of the prospective jurors had had any contact with the criminal justice system other than "traffic violations". Under these circumstances, the court erred in denying Mrs. Mischler's motion for a new trial.

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5 This court's review power, is not limited to the question certified only, Bell v. State 394 So.2d 979 (Fla. 1979), but extends to ancillary issues which affect the outcome of the case after review of the certified question. Trushin v. State, 425 So.2d 1126 (Fla. 1982).

The purpose of disqualifying[6] a person who has a pending prosecution is to avoid the possibility that that person might vote to convict in the hope of getting more favorable treatment from the prosecution in his own case.[7] Thompson v. State, 300 So.2d 301 (Fla. 2nd DCA 1974). Certainly, a defendant charged with a crime must know whether any prospective juror has such a disability before he can make an intelligent choice in selecting the jury which will try him.

In the present case, the juror, Mr. Warman, was not only subject to disqualification because of the pendency of criminal proceedings against him, however. He misstated his circumstances when asked about them, both inferentially at the time the entire jury pool was "pre-qualified" by the clerk of the court, and again when the trial judge trying Mrs. Mischler's case asked the prospective jurors whether any of them had a criminal history. In Skiles v. Ryder Truck Lines, Inc., 267 So.2d 379, 381-382 (Fla. 2nd DCA 1972), the appellate court observed:

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6 Section 40.013(1) provides:

> No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in his state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

7 This fear was borne out in the present case: why else would the juror approach the prosecutor after the jury delivered its verdict with the information that, "by the way", he was facing sentencing on charges the state was pressing against him?

> " ... The examination of a juror on his voir dire has a two fold purpose, namely to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law....
>
> "'It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, ... A juror who falsely misrepresents his interest or situation,or conceals a material fact relevant to the controversy, ... impairs ... [a party's] right to challenge.'"
>
> " ... When the right of challenge is lost or impaired, the ... conditions and terms for setting up an authorized jury are not met; the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant; ... A verdict is illegal when a peremptory challenge is not exercised by reason of false information ... [citing cases, ellipses original.]

In Skiles, it was held that a motion for new trial must be granted as a matter of law where a juror has lied in such a way that a party is precluded from exercising a challenge for cause or a peremptory challenge. This principal was recently applied in a criminal case, Mitchell v. State, 458 So.2d 819, 821 (Fla. 1st DCA 1984): "Failure to enforce the right to elicit from prospective jurors truthful answers to material questions render hollow the right of peremptory challenge."

The trial court relied on two cases to support its denial of Mrs. Mischler's motion for new trial on these grounds, neither of which is opposite. Powell v. State, 414 So.2d 1095 (Fla. 5th DCA 1982) concerns a juror's announcement, after rendition of the verdict, that she had been coerced into voting to convict. The issue in that case thus concerned the propriety of the de-

liberation process, a matter which "inhers in the verdict." The instant case, however, turns on the falsity of a juror's voir dire responses, a completely different legal issue.

State v. Rodgers, 347 So.2d 610 (Fla. 1977) is also readily distinguishable, although on somewhat different grounds. There it was disclosed after trial that one of the jurors was not over 18 years of age, so that she should have been disqualified from serving. This court's affirmance of the conviction turned on the fact that the juror's non-age did not affect her ability to render a fair and impartial verdict. In the present case, on the other hand, the juror's pending prosecution by the state raises serious concerns about his ability to be fair and impartial, particularly where, as here, the juror takes pains to assure that the prosecutor is aware of his upcoming sentencing immediately after the verdict of conviction is announced. Consequently, Mr. Warman's untruthful voir dire must be held to have directly affected the right of Mrs. Mischler to a fair trial by impartial jurors, and the trial court erred in denying Mrs. Mischler's motion for new trial.

CONCLUSION

The Amicus Curiae respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal and answer the certified question in the negative, in the above-styled cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Richard G. Bartmon, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 28th day of January, 1985.

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Of Counsel